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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 1041.

JULIAN KENNEDY, JR., Petitioner,

v.

EMERALD COAL AND COKE COMPANY,
Respondent.

BRIEF OF EMERALD COAL AND COKE COMPANY, RESPONDENT, IN OPPOSITION TO PETITION OF JULIAN KENNEDY, JR. FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

EARL F. REED,
CHARLES M. THORP, JR.,
Attorneys for Respondent.

2812 Grant Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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SUMMARY OF ARGUMENT.

The Respondent, Emerald Coal and Coke Company, opposes the granting of a writ of certiorari in this case. The decision of the Supreme Court of Delaware (R. 4070, *et seq.*), affirming the Decree of the Court of Chancery of Delaware (R-IV-2236), is unquestionably sound. The sole issue involved was whether Respondent's Plan of Refinancing, adopted by its Board of Directors and approved by the overwhelming majority of

its stockholders, was fair to Respondent and its stockholders. The Vice-Chancellor of Delaware found, upon a consideration of the evidence, that the plan was fair (R-IV-2263), and that finding was fully sustained by the evidence. The Supreme Court of Delaware approved the finding (R. 4079):

> "The opinion of the Vice-Chancellor is thoroughly satisfactory. His findings of fact and conclusions were based upon a searching appraisal of the testimony before him and being amply supported by the evidence will not be disturbed."

The Respondent was in dire financial straits and some recapitalization or reorganization was imperative. Its Board of Directors adopted a plan, which was subsequently approved by an overwhelming majority of the stockholders, involving the sale of an issue of capital stock to three other companies, but proposed first to offer the stock to the existing stockholders. Only one stockholder holding six shares exercised his rights and he is not a complainant here. Although none of the other stockholders exercised their rights and the time for such exercise had passed, the three companies who were to buy the stock, if the stockholders did not take it up, offered orally to sell stock to the stockholders notwithstanding that the subscription period had expired. Still none of the other stockholders elected to purchase.

The registration statement filed with the Securities and Exchange Commission was voluminous and contained all the details of the financial affairs of the Company. During the course of a hearing before the bituminous Coal Division of the United States Department of the Interior, about one year after the trial in Dela-

ware, it was discovered that there was a mistake in the registration statement, in that it stated that the developed track mileage was 42 miles, whereas in fact it was 62 miles. The Vice-Chancellor of Delaware held that this was an error not material and dismissed a Petition for a Bill of Review raising that point, among others. This point was also before the Supreme Court of Delaware on an appeal from the dismissal of the Bill of Review and the Court dismissed the appeal.

No Federal question is involved. The Petitioner has no right of action under the Federal Securities Act because he did not purchase stock on the faith of the Registration Statement and Prospectus. He therefore has no standing to complain in a Federal Court either that existing stockholders were not permitted to assign their subscription rights or that the Prospectus contained a mistatement. Furthermore, neither question is of such public importance as to warrant the issuance of this Writ.

Petitioner's numerous co-complainants in the Delaware courts have not joined in this Petition.

The facts stated by Petitioner, commencing on page 3 of his Petition are, in most respects, sustained by the record. However, we will have occasion to point out certain inaccuracies therein in the course of our argument.

ARGUMENT.

I.

The fairness of Respondent's Refinancing Plan is the sole issue in the Case and involves no Federal Question.

Petitioner admits in Section I of his argument that the Delaware courts had jurisdiction to decide whether the Respondent's Plan of Refinancing, set forth in its Registration Statement, was fair, which, as stated above, was the sole issue in the case. Respondent is in full agreement on that point and submits that that disposes of Section II of Petitioner's Argument. Surely this Court will not assume jurisdiction to review the findings of the Vice-Chancellor of Delaware, based upon substantial evidence, and affirmed by the Supreme Court of Delaware, to the effect that the Plan was fair. No Federal question is involved in that aspect of the case, and further comment seems unnecessary.

II.

The Registration Statement and Prospectus were not modified by oral Statements of the Respondent's President.

Petitioner's contention to the contrary, in Section III of his Argument, is not sustained by any testimony in the case. The facts are stated correctly by Petitioner on page 5 of his Petition, but the conclusion drawn therefrom is grossly inaccurate. As clearly appears from that statement, the Respondent did not enlarge the time for subscribing, nor change the provisions of

the Registration Statement with respect to the assignability of the subscription rights.

What actually happened, as disclosed by the record, was that the three companies who had agreed to buy all the stock to be issued under the Plan, which was not taken up pro rata by existing stockholders, had informed the Respondent's President that they would sell stock, which was to be allotted to them, to any stockholder at the price and in the amount to which he was entitled under the Plan, within a reasonable period, and if such stockholder wanted to assign his right in such offer, such assignment would be recognized. Obviously the Respondent was not making the offer and could not have made such an offer, because it had already committed itself to these three companies to sell to them all of the stock not subscribed for by the old stockholders.

At the trial of the case before the Vice-Chancellor of Delaware, this offer was repeated (R. 4076) by one of the companies which had acquired stock under the Plan. No stockholder availed himself of either of these opportunities to subscribe. It thus clearly appears that the price of $12.00 per share, at which the stock was sold, and the maner in which it was sold pursuant to the Registration Statement and Prospectus, was not unfair to existing stockholders, and the reasons therefor were amply demonstrated by the evidence. A specification of this evidence would not seem to be required in view of the findings and conclusions of the Vice-Chancellor of Delaware, which the Supreme Court of Delaware, as aforesaid, characterized as "thoroughly satisfactory."

The book-value of $99.00 a share to which Petitioner refers on page 4 of his Petition, was fully explained and conclusively shown to have no relation whatever to the actual value of the stock. The Vice-Chancellor of Delaware so found (R-IV-2252), which finding the Supreme Court of Delaware approved (R. 4079).

In any event, an oral modification of a Registration Statement and Prospectus of the character alleged, even if proved, which we deny, does not give Petitioner, a non-investor, a right of action under the Federal Securities Act.

III.

No Question of Public Importance is Involved.

In Section IV of his Argument, Petitioner refers to the engineering error in the Prospectus relating to the state of development of Respondent's coal mine, viz: 42 miles of entry development as against 62 miles, the actual figure. The Prospectus was a voluminous document, giving great detail respecting the history of the property, current and prospective daily production, remaining unmined tonnage, financial statements, amounts previously spent on carrying charges, and on development, and a great many other matters (R-I-29, *et seq.*). The one item which Petitioner claims was inaccurate appears at page 36 of Volume I of the record, viz:

> "The present development upon the property includes 42 miles of entries in the mine, of which approximately 7 miles are equipped with haulage roads of permanent construction."

The Respondent's explanation was that such figure of 42 miles did not include 20 miles of inactive, non-productive entries in a developed mine which Respondent had purchased. It was accurate as to the development made in the course of Respondent's operations.

It is true that the initial discovery by Respondent of this error, and its voluntary disclosure thereof to the Petitioner and his co-complainants in the Delaware proceedings, were not made until a year after the original trial before the Vice-Chancellor. However, among many other items, it was a matter of consideration by the Vice-Chancellor of Delaware upon a Petition for Leave to file a Bill of Review filed by Petitioner and his co-complainants on May 25, 1943 (R-IV-2273, at 2315, 2316). In his opinion advising the dismissal of that Petition, the Vice-Chancellor stated that the error was not of sufficient importance to affect the ultimate result of the case (Supp. R. 28, 29). The Supreme Court of Delaware concurred in this conclusion (R. 4086).

We submit that the number of miles of entry development is not the vital factor that weighs with a prospective investor in a coal company. The more important factor is its productive capacity, and there is no claim that the actual production was misrepresented. In fact, Petitioner, at page 22 of his Petition and Brief herein, quotes the Prospectus (R-I-36) to the following effect:

> "The present stage of development of the property permits an average daily production of 2,100 tons of coal."

Whether this amount of daily production came from a mine with 42 or with 62 miles of entries would seem

to be immaterial on the question of the value of the stock of Respondent.

The argument that a writ of certiorari should be granted to review the decision of the courts of Delaware on this unimportant point seems highly tenuous.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EARL F. REED,
CHARLES M. THORP, JR.,
Attorneys for Respondent,
2812 Grant Building,
Pittsburgh, Pa.